notice that appeal record was ready was served on the Appellant or on its solicitor. In my judgment March 18, 1983 should be treated as the date on which such notice was served on the Appellant, because that was the date the Labour Department informed the Appellant's solicitor by phone that the appeal record was ready. The Appellant has not shown in its affidavit that such notice was served after March 18, 1983. Therefore under Order 55 rule 2(1) of the Rules of the High Court 1980 Memorandum of Appeal should have been filed not later than April 1 1983, but it was filed on April 5, 1983. The burden is upon the Appellant to show that it was filed within time. The Appellant has failed to do so. Therefore this appeal is dismissed, with costs to Selvarajah (Respondent).

Appeal dismissed.

Solicitors: *Anthony Fernandez & Partners; Lobo & Associates.*

AZIMAH BTE. ISMAIL & ORS. v. CHANG NG PANG & ORS.

[O.C.J. (Peh Swee Chin J.) September 25, 1984]
[Seremban – Civil Suit No. 117 of 1980]

Tort – Negligence – Damages – Acceptance of workmen's compensation – Whether bar to plaintiffs' claim – Set-off against agreed damages – Workmen's Compensation Act, 1952, ss. 10(6), 27(2) & (3), 28, 41(1) & (2).

Workmen's Compensation – Acceptance of workmen's compensation – Whether bar to plaintiff's claim for damages.

The deceased died in a road accident involving motor lorry AJ 3979 and another lorry BAT 9507 owned by the 4th defendant, the Government of Malaysia, the employer of the deceased who was a passenger in the latter lorry. The 3rd plaintiff, the widow of the deceased brought this action for herself and as next friend of her 2 minor children, the 1st and 2nd plaintiffs against the driver and owner of AJ 3979 and the owner of BAT 9507. Damages were agreed and liability admitted, subject to a preliminary point relied on by the 4th defendant, so that should the point be upheld by the Court, the owner of AJ 3979 had to pay the whole of the agreed damages of $60,000. The preliminary point was that since compensation of $14,000 was paid to the deceased's family, this action against the 4th defendant was therefore bad in law and cannot be maintained under s.41 of the Workmen's Compensation Act, 1952.

Held: (1) there was no evidence that the widow had applied to settle any question under s. 27(2) of the Act. The preliminary enquiry was one under s. 27(3). The memorandum of agreement signed between the widow and the 4th defendant was never recorded under s.28. The deposit of the workmen's compensation could not be said to be such damages recovered in any court;

(2) in the circumstances, judgment with costs should be returned against all defendants for $60,000 inclusive of interest, being agreed damages.

(3) the 4th defendant was at liberty to set off the sum of $14,000 against the damages.

Case referred to:

(1) *Lee Yen & Ors.* v. *Kepong Mines Ltd* [1963] M.L.J. 396.

CIVIL SUIT.

Khoo Eng Chin for the plaintiffs.
S. Kanagasabapathi for 1st & 2nd defendants.
Miss Josephine Siva (Federal Counsel) for 4th defendant.

Cur. Adv. Vult.

Peh Swee Chin J.: The 3rd plaintiff, the widow of the deceased concerned in this running-down action brought the action for herself and as next friend of her two minor children, against the driver and owner of motor lorry AJ 3979 and the owner of motor lorry BAT 9507 respectively, both lorries being involved in the same fatal collision. Further, it is common ground that the deceased who was a passenger in lorry BAT 9507 was also an employee of the owner of the lorry (the 4th defendant) in which he was travelling.

This action took an unusual course. Damages were agreed earlier in the sum of $60,000/– inclusive of interest, so was liability admitted in proportions of 50/50 against both owners of both lorries, subject, I believe, to a preliminary point, being relied on by the 4th defendant *i.e.* the owner of lorry BAT 9507 as well as the employer of the deceased so that should the preliminary point be upheld by the Court, the claim against the 4th defendant stands dismissed with the owner of the lorry AJ 3979 having had to pay wholly the agreed damages.

The preliminary point is as pleaded in para. 7 of the defence of the 4th defendant in the following words:–

"7. Further, and in the alternative, the 4th Defendant will contend that as compensation amounting to $14,000/- was paid to the deceased's family, this action against the 4th Defendant is therefore bad in law and cannot be main-

tained under section 41 of the Workmen's Compensation Ordinance, 1952."

Section 41 of the Workmen's Compensation Act, 1952, relied on reads:–

"41. (1) Nothing contained in this Act shall be deemed to confer any right to compensation on a workman in respect of any injury if he has instituted and is prosecuting a suit for damages in respect of that injury in any court against his employer or if he has recovered damages in respect of that injury in any court from his employer; and no suit for damages shall be maintainable in any court by a workman against his employer in respect of any injury –

(a) if he has applied to the Commissioner to settle any question in respect of the injury under section 27(2); or

(b) if an agreement has been come to between the workman and the employer and such agreement has been recorded under section 28; or

(c) if he has recovered damages in respect of the injury in any court from any other person.

(2) If a suit is instituted in any court to recover damages independently of this Act for injury caused by any accident, and it is determined in such suit or an appeal that the injury is one for which the employer is not liable in such suit, but that he would have been liable to pay compensation under this Act, the suit shall be dismissed; but the trial court, or if the determination is given on appeal, the appellate court shall, if the workman so choose, proceed to assess such compensation, but may deduct therefrom all or part of the costs which, in its judgment, have been caused by the workman instituting the suit instead of proceeding under this Act: and in any proceedings under this subsection, when the trial court or appellate court assesses the compensation, it shall give a certificate of the compensation it has awarded and the direction it has given (if any) as to the deduction of costs and such certificate shall have the force and effect of an Arbitrator's order."

It is obvious that the 4th defendant will succeed if the 4th defendant/employer can satisfy one of those three conditions set out in section 41, sub-section (1).

The first of the three conditions is as to whether the widow had applied to the Commissioner to settle any question in respect of the injury under sub-section (2) of section 27. 4th defendant called DW1, a labour officer who conducted a preliminary enquiry in this connection, meeting the widow and recording her evidence. He said to the effect that he was informed of the accident by the 4th defendant. He then called for the widow for a preliminary enquiry on October 20. She did not bring enough documents and she was not sure as to whether she wanted to claim workmen's compensation, and he fixed a second date *i.e.* October 28, 1978 for the preliminary enquiry. On October 28, the widow turned up and gave evidence of particulars and said she did not wish to claim damages under Common Law. (See p 1, being brief notes of such evidence recorded in English). In evidence, DW1 said he had explained repeatedly the difference between the claim under the Workmen's Compensation Act and under ordinary law. On June 12, 1980 there was another enquiry, expressly stated both in the notes of evidence (D 4) and in the evidence of DW 2, another labour officer, to be held under section 10(6) of the same Act, for the purpose of apportionment of the compensation deposited by the 4th defendant.

I regret I am unable to find any evidence that the widow had applied to settle any question under sub-section (2) of section 27; in fact from the evidence it is crystal clear that there was no need for her to so apply at all and she and the 4th defendant had come to some agreement on the compensation. The preliminary enquiry held by DW 1 was, it is a common ground, not an enquiry under section 27(2) but one under section 27(3).

On the second condition, it is equally clear that there was no evidence that the memorandum of agreement signed between the widow and the deceased's employer has ever been recorded under section 28 of the Act.

On the third condition, it is common ground that no damages have been recovered in any court from any other person, and the deposit of the workmen's compensation could not be said to be such damages recovered in any court.

I step on with delight the trail already blazed before me, in regard to similar points, by Azmi, J. (as he then was) in *Lee Yen & Ors.* v. *Kepong Mines Ltd.*[1]

It may not appear to be logical that the acceptance of the sum of $14,000/– as workmen's compensation may not yet in this case bar a claim against the same employer, the payer of the said sum in respect of the same accident. However, the provisions of section 41 sub-section (1) aforesaid are specific and could not be treated as a dead letter but would have to be given effect to. It is not really necessary to question the wisdom of such provisions, though with hindsight, one can be forgiven for presuming them as safeguards against ignorance and acceptance of such workmen's compensation under compelling condition

of abject poverty albeit with awareness of a possibly very much bigger but possibly very much delayed claim at common law.

Having said so, it would be the bounden duty of the Court to allow a set-off of the said sum of $14,000/- against damages to be awarded, provided that such a set-off has been pleaded. Obviously it has not been pleaded expressly by the 4th defendant, but the very reliance on the payment of the sum of $14,000/- for excluding liability against the 4th defendant, is sufficient in my view, though somewhat tenously, to imply and include such a plan of set-off.

The Court therefore makes the following orders:-

(1) Judgment with costs against all defendants for $60,000/- inclusive of interest, being agreed damages;

(2) this Court doth declare that the 4th defendant be at liberty to set off the sum of $14,000/- against the said damages, and

(3) the apportionment of such damages among the said widow and the said minor children is to be dealt with later on a summons-in-chambers.

Claim allowed.

Solicitors: *Khoo & Sidhu; R.K. Nathan & Co.*

THE "YIH SHEN" M.V. "YIH SHEN," OWNERS OF CARGO ON v. M.V. "YIH SHEN," OWNERS OF

[O.C.J. (Edgar Joseph Jr. J.) September 13, 1984]
[Penang – Admiralty In Rem No. 2 of 1984]

Shipping law – Admiralty action in rem – Breach of contract of carriage – Arrest of ships – Damages – Intervener claiming interest – Ex parte orders in favour of Intervener – Serious question to be tried – Real prospect of success at trial – Interest in cargo – Whether ex parte orders shall be vacated – R.H.C. 1980, O.41 r. 12.

In this case, the plaintiffs as owners of the cargo laden on board the ship "Yih Shen" sued the owners of the ship, the defendants, claiming damages for breach of a contract of carriage. The ship was arrested on application of the plaintiffs. On February 1, 1984, the charterers of the ship entered a caveat. The defendants put the plaintiffs to strict proof that they were the owners of the cargo, claiming that the plaintiffs were in breach of the contract because of default of certain payment. At this point of time, the Intervener applied for leave to intervene as beneficial owner of the ship "Yih Shen". In a separate *ex parte* application, the intervener applied for a stay of the orders of court dated February 13, 1984 which enabled the plaintiffs to transfer the cargo on the "Yih Shen" to the ship "Vitya Komenco" and for an interim injunction restraining the plaintiffs from doing so. In the event the injunction and consequential orders ("the *Ex Parte* Orders") were granted in favour of the Intervener. The plaintiffs then made the present application to set aside the *Ex Parte* Orders.

Held: (1) the Intervener has not demonstrated that there is a serious question to be tried or that he has a real prospect of success at the trial of establishing his claim to the ownership of the ship "Yih Shen";

(2) the *Ex Parte* Orders and the order granting leave to intervene were vacated, as the Intervener had not established a sufficient interest in the cargo;

(3) the Intervener must pay the costs of the plaintiffs and the defendants, and the usual enquiry as to damages was ordered.

Cases referred to:

(1) *Macaura* v. *Northern Assurance Co. & Ors.* [1925] A.C. 619, 633.
(2) *The Aventicum* [1978] 1 LI.L.R. 184.
(3) *Eng Mee Yong & Ors* v. *Letchumanan* [1979] 2 M.L.J. 212, 217, Col. 2 F.
(4) *Re Young Manufacturing Co. Ltd.* [1900] 2 Ch. 753.
(5) *American Cyanamid* v. *Ethicon* [1975] A.C. 396, 407.
(6) *Pegang Mining Co. Ltd.* v. *Choong Sam & Ors.* [1969] 2 M.L.J. 52, P.C.

SUMMONS-IN-CHAMBERS.

N.T. Vello for the plaintiffs.

R.J. Manecksha for the defendants.

Peter Dason for the Intervener.

K.S. Choo for the Caveator.

Cur. Adv. Vult.

Edgar Joseph Jr. J.: This was an application by way of Summons-in-Chambers (En. 32) by the Plaintiffs herein, supported by affidavit, praying for dissolution of an *ex parte* interlocutory injunction and orders consequential thereto made by this Court on February 24, 1984 (En. 26) ("the *Ex Parte* Orders") in favour of one Cherry Chow ("the Intervener").

In order to understand this application, it is necessary to set out, briefly, the history of the proceedings out of which it arose.